

No. 328

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CHARLES ELMORE GROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

ESTATE OF W. M. L. FISKE, DECEASED, CENTRAL
HANOVER BANK AND TRUST COMPANY, EXECUTOR,

Petitioner,

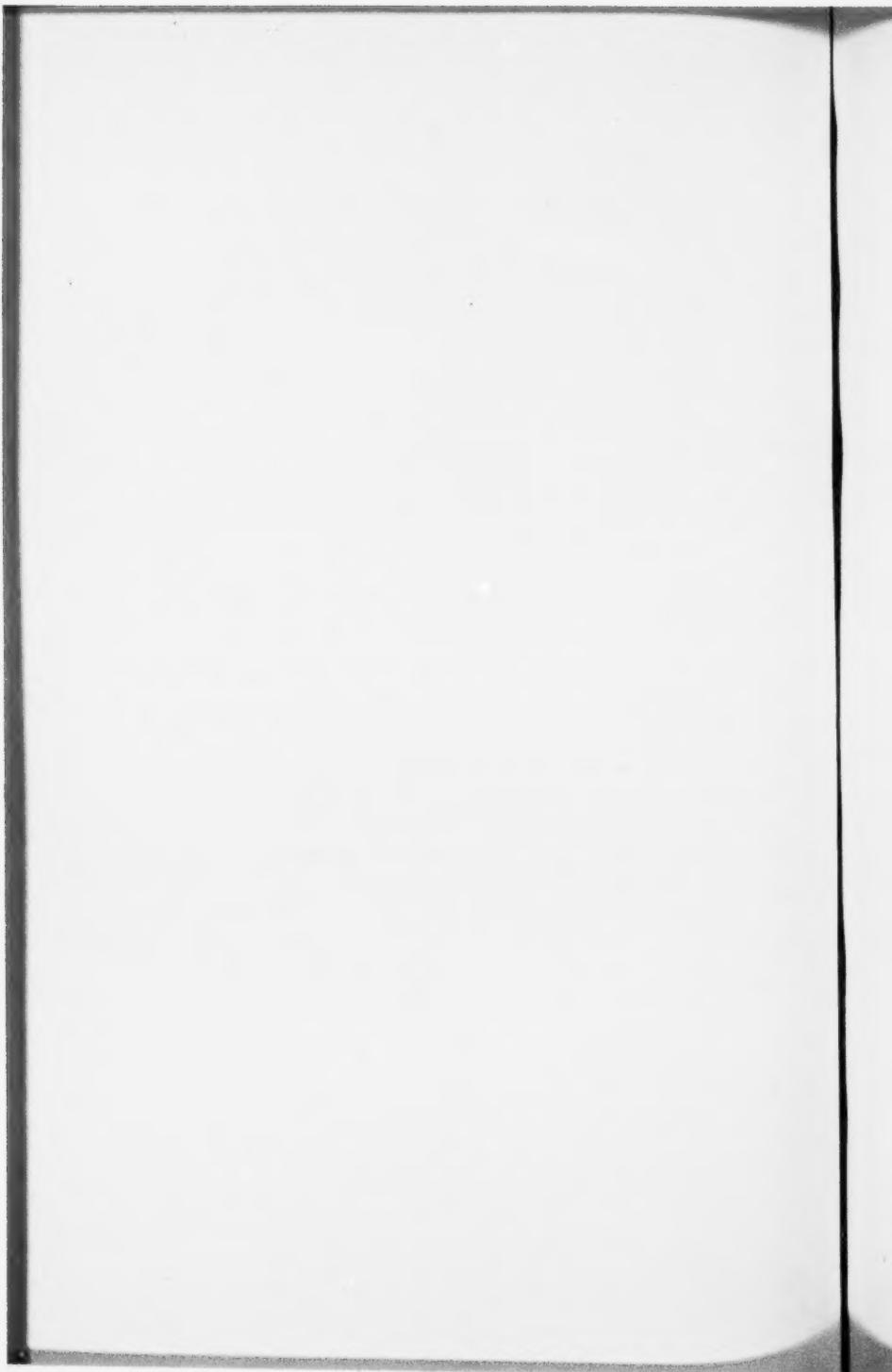
vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

CHARLES C. PARLIN,
JOHN A. REED,
Counsel for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1942.

ESTATE OF W. M. L. FISKE, Deceased,
CENTRAL HANOVER BANK AND TRUST
COMPANY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petitioner, Estate of W. M. L. Fiske, Deceased, Central Hanover Bank and Trust Company, Executor, by its counsel, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on May 23, 1942.

Opinions Below.

This cause originated by the filing of a petition in the United States Board of Tax Appeals to review the determination of the Commissioner of Internal Revenue that there was a deficiency in the income tax of the petitioner's decedent for the calendar year 1936. The opinion of the

Board of Tax Appeals redetermining the deficiency is reported in 44 B. T. A. 227 (Record, p. 11).

The respondent appealed from the decision of the Board of Tax Appeals to the Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals is reported in 128 F. (2d) 487 (R. 34).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 23, 1942 (R. 42). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended, 43 Stat. 938, U. S. C., Title 28, Section 347. The petition is timely under U. S. C., Title 28, Section 350.

Questions Presented.

The ultimate issue presented is whether the salary of the petitioner's decedent (hereinafter sometimes referred to as the taxpayer) for 1936 was subject to United States income tax or whether such salary was exempt from tax under Section 116 (a) of the Revenue Act of 1936. The salary was not subject to tax if (1) the taxpayer was "a bona fide non-resident of the United States for more than six months during the taxable year" within the meaning of Section 116 (a) of the Revenue Act of 1936 and (2) the salary was income "from sources without the United States" within the meaning of Sections 116 (a) and 119 (c)(3) of the Revenue Act of 1936.

The following questions of law involving the construction of the aforementioned statutory provisions are presented:

- (1) Whether the taxpayer who lived in France during the entire period 1925 to 1940 lost his status

as "a bona fide non-resident of the United States for more than six months during the taxable year" as to the year 1936 solely because of the fact that he was physically present in the United States during the entire year 1936, having been unavoidably detained in the United States during the entire year 1936 on account of illness.

(2) Whether it is necessary to the taxpayer's case that the services performed by the taxpayer outside of the United States, for which the taxpayer was paid his salary in 1936, be performed during the taxable year 1936.

Statute and Regulations Involved.

The relevant portions of the Revenue Act of 1936 are set forth in the Appendix. There are no pertinent regulations.

Statement of Facts.

The taxpayer was a Vice-President of Dillon, Read & Co. and since 1924 had been in charge of the company's Paris office (R. 11, 12). In December, 1935, he came to this country to spend a holiday with his children, was taken critically ill and was unable to return to his home and work in Paris until March of 1937 (R. 12, 13). Thereafter he stayed at his post in Paris until May, 1940, when he was forced to leave because of the German invasion (R. 13). Throughout the period of his prolonged, fifteen months' illness in this country the company continued his salary (R. 13). His salary so paid for 1936 was \$37,400 (R. 13).

The Commissioner elected not to include the testimony and the exhibits as part of the Record. The Board's Findings of Fact are set forth in the Record beginning at page 11. The Board found as a fact that "the petitioner was a bona fide non-resident of the United States during all of the calendar year 1936" (R. 14).

Reasons for Granting the Writ.

I. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Muhleman v. Hoey*, 124 F. (2d) 414, decided January 8, 1942 (no petition for certiorari filed), and contrary to the doctrine of *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115, in holding that the salary was not an "amount(s) received from sources without the United States" within the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936.

II. The decision of the Circuit Court of Appeals on the question of residence is in conflict with *Penfield v. Chesapeake, etc.*, 134 U. S. 351, and perhaps also in conflict with *Texas v. Florida*, 306 U. S. 398, and *District of Columbia v. Murphy*, 314 U. S. 441.

III. The Circuit Court of Appeals decided two important questions of federal law (stated *supra* under "Questions Presented"), which have not been, but should be, settled by this Court.

IV. The Circuit Court of Appeals erred in its decision.

Conclusion.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court as provided in Section 240 of the

Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, Section 347), and that the judgment of the said Circuit Court of Appeals in the above-entitled cause, and every part thereof, may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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